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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS RYBICKI, FREDRIC GRAE and
GRAE, RYBICKI & PARTNERS, P.C.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS, JOINED BY THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE* [1]

The New York Council of Defense Lawyers ("NYCDL"), established in 1986, is a not-for-profit professional association whose elected membership consists of approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. The NYCDL's principal mission is to engage the Bench and Bar, including government attorneys, in a continuing collegial dialogue — through symposia, retreats, lectures, testimony, *amicus* briefs, and special events — concerning the legal, ethical and practical issues confronting attorneys and judges in the criminal justice system, particularly in the federal courts of New York. Because of the wide experience and expertise of its members, the NYCDL has been invited to appear as *amicus curiae* in federal and state appellate courts. Representatives of the NYCDL have testified before Congress and the United States Sentencing Commission.

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1. Pursuant to Rule 37(2)(a) and (6) of the Rules of the Court, the consent of the parties to submission of this *amicus* brief has been obtained and filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the organizations named in the Statement of Interest, has made a monetary contribution to the preparation or submission of this brief.

Many of the NYCDL's members have, as federal prosecutors, investigated or prosecuted "white-collar" crime and official corruption, including mail and wire fraud, and many of its members have defended clients in such investigations or prosecutions. As a result, the NYCDL has vast experience with and a deep professional interest in the meaning and application of 18 U.S.C. §1346, Congress's attempt to restore the government's ability to prosecute deprivations of "the intangible right of honest services" through the federal fraud statutes following the Supreme Court's rejection of the "honest services" theory in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987). The NYCDL is therefore uniquely qualified to comment on, and to assist this Court in deciding, the important constitutional issue whether §1346 is unconstitutionally vague on its face.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its

particular concerns is ensuring that all individuals, including the criminally accused and suspected, not be subjected to prosecutorial overreaching.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of approximately 800 attorneys, including private practitioners, public defenders and law professors. It is a recognized state affiliate of the NACDL. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; educating the public on such issues; and promoting the exchange of ideas and research, including appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

SUMMARY OF ARGUMENT

In its decision below (*United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), the *en banc* Court of Appeals for the Second Circuit divided 7-4 on the constitutionality of 18 U.S.C. §1346, which provides that the term "scheme or artifice to defraud" in the federal criminal fraud statutes (18 U.S.C.§§1341, 1343, 1344, 1347, 1348) "includes a scheme or artifice to deprive another of the intangible right of honest services." As catalogued by the principal dissent below (*id.* at 155-65 (Jacobs, J.)), the division among the judges of the Second Circuit mirrors the kind of divisions and confusion that exists among the judges of virtually all circuits concerning the meaning, scope and constitutionality of §1346. The decision below demonstrates that the Court's standards for granting review (*see* Rules 10 (a) and (c) of the Rules of the Court) are fully satisfied, particularly since the judicial gloss required to render the statute comprehensible implicates important principles of federalism.

This case raises the equally or perhaps more important issue of the standard the federal courts should apply when determining the facial validity of a federal criminal statute outside the First Amendment context: the "no set of circumstances" standard articulated in *dicta* in *United States v. Salerno*, 481 U.S. 739, 745 (1987), the "permeated with vagueness" test articulated in *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999), or some other formulation. Since this Court is divided on that question, it is not surprising that the federal appellate

courts, including the Second Circuit, are similarly divided on the issue.

ARGUMENT

I.

This case raises an issue of federal law of exceptional importance on which several federal appellate courts are at least internally divided, if not divided between or among the circuits: the facial validity of 18 U.S.C. §1346. *See United States v. Rybicki*, 354 F.3d 124, 162-65 (2d Cir. 2003) (*en banc*) (Jacobs, J., dissenting) (cataloguing §1346 case law; "the vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge"). The sharply divided *en banc* decision of the court below — five opinions, none of which commanded a majority of the court — is a perfect example of the conflict and confusion that reigns among the judges of the federal appellate courts concerning the meaning, scope and constitutionality of 18 U.S.C. §1346. Nor is the conflict and confusion limited to the courts; it apparently pervades Congress as well. *United States v. Handakas*, 286 F.3d 92, 102-03, 105 (2d Cir. 2002) (describing the "uneven" development of the "honest services" doctrine in the courts, and the conflict between the Department of Justice and the House Subcommittee on the meaning of "honest services").

Moreover, determining the constitutionality and, if constitutional, the meaning of §1346 is particularly

important because the validity and interpretation of the statute directly implicates important questions of federalism. As noted by Judge Jacobs in his dissent below:

> [W]ithout any obvious limiting principles, the majority opinion invites federal prosecutors to police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of "honest services" fraud. This construction of section 1346 undoubtedly "leaves it outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."

354 F.3d at 164-65 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

The judiciary's traditional deference to Congressional enactments should not deter this Court from considering the facial constitutionality of §1346 since it is fair to conclude from the uncertainty that prevails concerning the meaning of the statute that Congress disregarded this Court's firm warning "to speak more clearly" if it wanted to punish deprivations of "honest services" under the federal fraud statutes. *McNally*, 483 U.S. at 360. If this Court were to review the facial constitutionality of §1346, and strike it down as unconstitutionally vague, Congress could quickly and easily go back to the drawing board, as it did after

McNally, although this time Congress would surely be motivated to legislate more carefully.

Moreover, asking Congress to redraft the statute, and this time to "speak more clearly," is completely appropriate, indeed required, under the separation of powers doctrine. The plurality opinion reflects the view that the federal courts must "look to the [pre-*McNally*] case law" to determine whether the meaning of "honest services" is clear enough in the statute. 354 F.3d at 136-37. In other words, the court below would rely on the common law methodology of case-by-case adjudication to determine the meaning of the statute, even though there is no common law of crimes in this country. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). As Judge Jacobs correctly noted in his dissenting opinion, "'[L]egislatures and not courts should define criminal activity.'" 354 F.3d at 164 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

Finally, if this Court did hold the statute facially unconstitutional, the lower federal courts could avoid their present unappealing fate, i.e., repeatedly being asked to decide "as-applied" challenges to §1346, like the one in this case.

In short, the facial constitutionality of §1346 is an important issue that satisfies this Court's standards for granting discretionary review. *See* Rule 10(a) and (c) of

the Rules of the Court. Certiorari should be granted to review that question.[2]

II.

While the facial constitutionality of §1346 is plainly an important, certiorari-worthy question, this case presents another, perhaps more important, question on which this Court itself is divided: what standard should apply in determining facial constitutional challenges outside the First Amendment context, whether "vagueness permeates the text" of the statute (*City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)), or whether "no set of circumstances exists under which the Act would be valid" (*United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)), or another formulation altogether?

The court below was hopelessly divided on this issue. The five-member plurality opinion left the issue open and undecided (354 F.3d at 131-32 & n.3), while opining that the facial validity of the statute would survive scrutiny under either the *Morales* or *Salerno* standard. One of the concurring opinions would have eschewed the facial constitutionality issue altogether because it was not

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2. The facial validity of §1346 is a particularly important argument in this case because a conviction based on a facially invalid statute is a "structural" defect that would trump the waiver problems noted in the opinions below. *See Neder v. United States*, 527 U.S. 1, 7-9 (1999) (cataloguing "structural" defect cases).

raised in the district court or before the panel. *Id.* at 147-48 (Katzmann, J., concurring). Another member of the court below concurred on the ground that *Salerno* was the prevailing standard for determining facial challenges, and §1346 satisfied that standard. *Id.* at 148-52 (Raggi, J., concurring). The four-member dissent would have applied the *Morales* standard, and would have held the statute facially unconstitutional on plain error grounds. *Id.* at 155 (Jacobs, J., dissenting).

As reflected in the opinions below, the standards governing facial challenges are still unsettled and in a state of flux. *See Lerman v. Board of Elections*, 232 F.3d 135, 144 n.10 (2d Cir. 2000) ("It is not even clear that *Salerno's* 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context") (original emphasis). The movement among the lower federal courts appears to be towards loosening the standards for facial challenges, so that a criminal statute that is pervasively vague, i.e., vague in many or most of its applications, is attackable on its face, even if a particular application could pass constitutional due process muster. *Id.* Indeed, the standard for facial challenges has never been as stringent in practice as generally believed, and this Court has upheld facial challenges that would not satisfy the "no set of circumstances" test. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application.") (citation omitted).

The most stringent standard for facial challenges derives from *dicta* in *United States v. Salerno*, where this Court upheld the constitutionality of the preventive detention provisions of the Bail Reform Act of 1984. The Supreme Court stated in *Salerno* that "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745.

In *City of Chicago v. Morales*, decided 12 years after *Salerno*, a plurality of this Court concluded that pervasive vagueness could render a criminal statute facially unconstitutional. There, this Court struck down on due process grounds a Chicago ordinance designed to control violent street gangs by permitting the police to arrest anyone reasonably believed to be a gang member (or in the company of a gang member) found loitering in a public place "with no apparent purpose" after having been ordered by the police to disperse. The *Morales* plurality expressly rejected *Salerno's* "no set of circumstances" *dicta*:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, the

Court nevertheless entertained their facial challenge).

527 U.S. at 55 n.22 (citation omitted). Indeed, the *Morales* plurality found it "doubtful" that the *Salerno dicta* should ever apply. *Id.* In any event, the *Morales* plurality adopted a different and more easily satisfied standard for determining facial challenges: "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.[3]

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3. We recognize that the ordinance struck down in *Morales* was found to infringe on constitutionally protected liberty rights. 527 U.S. at 55. The plurality opinion in *Morales*, as well as the subsequent decisions from the circuit courts cited below, demonstrate that *Morales*'s test for facial challenges was not limited to the kinds of statutes at issue in cases like *Colautti v. Franklin*, 439 U.S. 379 (1979). Nor can §1346 be distinguished from the ordinance at issue in *Morales* based on the presence or absence of a *mens rea* requirement. While "a scienter requirement *may mitigate* a law's vagueness, especially with respect to the adequacy of the notice to the complainant that his conduct is proscribed" (*Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (emphasis added)), such a requirement does not eliminate the vagueness, particularly in a statute like §1346 in which the *mens rea* — intent to "deprive another of the intangible right of honest services" — is itself vague. In any event, a scienter requirement could not cure

(continued...)

Since *Morales*, a number of lower federal courts have questioned the vitality of the *Salerno* formulation. *See, e.g., Berkley v. United States*, 287 F.3d 1076, 1090 (Fed. Cir. 2002); *AMFAC Resorts, L.L.C. v. United States Department of the Interior*, 282 F.3d 818, 825-28 (D.C. Cir. 2002) (collecting cases); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329-30 (11th Cir. 2001); *Staley v. Jones*, 239 F.3d 769, 789-90 (6th Cir. 2001); *Lerman*, 232 F.3d at 144 n.10; *United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000). *But see S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (despite noting inroads on *Salerno* formulation, including in abortion rights context, "we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so").

In addition to judicial economy served by avoiding endless "as applied" challenges to statutes like §1346, logic and policy recommend the *Morales* test over the *Salerno* formulation. If *Salerno* really had articulated the standard for facial challenges, such challenges would be rare indeed:

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3. (...continued)
§1346's failure to limit prosecutorial discretion, which is the "more important" of the two factors that the void for vagueness doctrine was designed to prevent or cure. *Handakas*, 286 F.3d at 107 (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

> In an as-applied challenge, if the statute in question cannot be constitutionally applied to the litigant, then she will prevail without having to show that no set of circumstances exists under which the statute could be constitutionally applied to someone else. On the other hand, if the litigant loses her as-applied challenge, she will also lose her facial challenge under *Salerno* because the statute is constitutional in at least one circumstance. In short, a litigant can prevail on a facial challenge only if she can also prevail on an as-applied challenge, and even then she may lose the facial challenge. *Under Salerno, a litigant bringing a facial challenge rather than an as-applied challenge gains nothing.*

Dorf, "Facial Challenges to State and Federal Statutes," 46 Stan. L. Rev. 235, 239 (Jan. 1994) (emphasis added).

In short, *Salerno's* "draconian" standard (Dorf at 239) should not control the facial challenge to §1346 invited by this Court. If the *Morales* standard is used, as it should be, no one could doubt that "vagueness permeates the text" of the statute. Whatever standard applies, however, the issue is obviously one of great importance on which the lower federal courts and this Court are divided.

CONCLUSION

Win or lose, the issues presented by this case deserve plenary review by this Court. Petitioners' petition for certiorari should be granted.

Dated: New York, New York
May 17, 2004

Respectfully submitted,

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